IN THE HIGH COURT OF KERALA AT ERNAKULAM

PRESENT :

THE HONOURABLE MR. JUSTICE PIUS C.KURIAKOSE

TUESDAY, THE 12TH JUNE 2007 / 22ND JYAISHTA 1929

WP(C).No. 12094 of 2004(M)

AGAINST THE ORDER DATED 05/04/2004 IN OS 587 1992 IN EP.81/2003 of MUNSIFF COURT, KOTTARAKKARA

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PETITIONER:

T.THOMAS BABU, S/O.LATE C.THARIAN,
NEEMA DALE, MARANGATTUKONAM, VALAKOM,
KOTARAKKARA.

BY ADV. SRI.ALEX VARGHESE

RESPONDENTS:

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1. R.VISWANATHAN NAIR, S/O.RAGHAVA KURUP,
SREE BHAVAN, MARANGATTUKONAM,
VALAKOM, KOTARAKARA.

2. MARIAMMA THARIAN, BUNGLAVIL PUTHEN
VEEDU, MARANGATUKONAM, VALAKOM,
KOTTARAKARA.

3. SUSAMMA THARIAN, BUNGLAVIL PUTHEN
VEEDU, MARANGATUKONAM, VALAKAM,
KOTTARAKARA.

4. MARY THARIAN, BUNGLAVIL PUTHEN VEEDU,
MARANGATUKOANAM, VALAKOM, KOTARAKARA.

5. STATE OF KERALA REP. BY THE DISTRICT
COLLECTOR, KOLLAM.

6. REVENUE DIVISIONAL OFFICER,
COLLECTORATE, KOLLAM.

R1 BY ADV. SRI.T.K.MARTHANDAN UNNITHAN
R5 & R6 BY GOVT. PLEADER MR.SHYSON P.MANGUZHA

THIS WRIT PETITION (CIVIL) HAVING BEEN FINALLY HEARD ON 12/06/2007, THE COURT ON THE SAME DAY DELIVERED THE FOLLOWING:

APPENDIX(WPC NO.12094/04)

PETITIONER'S EXTS.:

EXT.P1: PHOTOCOPY OF DECREE DATED 8.11.2002 IN O.S.NO.587/92 OF THE MUNSIFF'S COURT, KOTTARAKKARA.

EXT.P2: PHOTOCOPY OF E.A.NO.227/2003 DATED 17.10.2003 FILED BY THE PETITIONER AND D10.

EXT.P3: PHOTOCOPY OF ORDER DATED 16.2.2004 IN E.A.NO.227/03 IN E.P.NO.81/03 IN O.S.NO.587/92.

PIUS C. KURIAKOSE,J.

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W.P.(C) No.12094 of 2004

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Dated: 12th June, 2007

JUDGMENT

What precisely is the distinction between legal heir and legal representative, whether the execution court can enforce obedience to a decree of mandatory injunction even by compelling perpetration of trespass are among the questions involved in this Writ Petition under Article 227 of the Constitution.

2. The additional 6th defendant-judgment-debtor- respondent in a proceeding for execution of a decree of mandatory injunction commanding restoration of the decree schedule pathway challenges Ext.P3 order passed by the execution court directing him and the other legal heirs of his deceased father, the 1st defendant to restore the pathway to its original width and failing obedience to the above direction, to arrest and detain them in civil prison. Ext.P1 is copy of the decree which would show that though the legal heirs of the 1st defendant had been impleaded on the trial side itself, decree has been passed only against defendants 1 and 2 and not against the legal heirs of the deceased defendant No.1. Ext.P2 is copy of an application which was filed before the execution court by the petitioner and the 10th defendant in the suit contending that there is

no executable decree against them and seeking a decision regarding the executability of the decree against them. Ext.P3 is copy of the order by which the learned Munsiff held that the decree was not executable against the 10th defendant but the same was executable as against the petitioner and others though there is no decree against them on the reason that they are legal representatives of the 1st defendant against whom there was decree. The facts relating to this case have been dealt with by me more detail in my judgment in W.P.C.No.12099/04 filed by the decree-holder. Under that judgment I have upheld the order of the execution court declining execution against the 10th defendant.

3. Mr.Alex Varghese, learned counsel for the petitioner and Mr.T.K.M.Unnithan, learned counsel for the respondent-decree-holder addressed me in extenso.

4. One of the grounds urged before me by Mr.Alex Varghese was that the decree which is attempted to be executed against the petitioner is decree against a dead person, namely, the 1st defendant who was dead and gone at the time the decree was issued. Though the petitioner and the other legal heirs of the 1st defendant were impleaded on the trial side itself the decree-holder did not seek

amendment of the relief portion of the plaint so as to seek decree against the persons so impleaded and this has resulted in the court passing decree against a dead person alone. Decree against a dead person is a nullity and is not executable. Counsel submitted that the decree of declaration and mandatory injunction passed in respect of the property against the 1st defendant cannot be obeyed by the legal heirs of the deceased 1st defendant since the properties are conveyed to the 10th defendant years prior to the institution of the suit. It will be possible to obey the decree only by trespassing into the property owned and possessed by the 10th defendant. The execution court is not justified in insisting that the petitioner trespasses into the 10th defendant's property for obeying a decree which has not been passed against him.

5. Mr.T.K.M.Unnithan, learned counsel for the respondent-decree-holder would submit that the petitioner is concededly a son and legal heir of the deceased 1st defendant against whom there is decree. He was made party to the suit. He had lodged a counter claim along with his brothers raising claims against the plaintiff. The counter claim was dismissed. The failure to amend the relief portion of the plaint so as to seek decree against the petitioner was an

omission on the part of the counsel who was conducting the case on behalf of the plaintiff and for such omission the respondent-decree-holder may not be penalised. The decree of injunction passed by the trial court with notice to the petitioner is being blatantly violated.

6. In reply the learned counsel for the petitioner would highlight the distinction between the expressions 'legal heir' and 'legal representative' and submit that since the schedule pathway was not the property of the deceased 1st defendant at the time of his demise, the petitioner or for that matter any of the other legal heirs of the deceased 1st defendant could not be legal representatives of the deceased 1st defendant in relation to the schedule property.

7. The learned Munsiff noticed under Ext.P3 order that though the 10th defendant and the additional defendants 6 to 9 were impleaded as defendants on the trial side itself, the petitioner plaintiff did not seek relief against them and that the court passed decree only against D1 and D2. It was further noticed that the B schedule property is presently owned by the 10th defendant. The court found that the decree which is passed against D1 and D2 is not binding on the 10th defendant since the 10th defendant had purchased the property from the predecessor-in-interest of the 2nd defendant years

prior to the institution of the suit. But in the case of additional defendats 6 to 9, the learned Munsiff has taken the view that those defendants are legal representatives of the 1st defendant and therefore the decree against the 1st defendant is executable against them. It is on that reasoning the impugned directions are passed against the petitioner and additional defendants 7, 8 and 9 to restore the B schedule pathway to its original condition failing which it is held that the decree will be enforced by arrest and detention of the petitioner and the fellow judgment-debtors.

8. I am at a loss to understand how the court below could say that the petitioner and the additional defendants 7, 8 and 9 are the legal representatives of the 1st defendant. Section 2(11) of the Code of Civil Procedure defines the term "legal representative" as follows:

> "Legal representative" means a person who in law represents the estate of a deceased person, and includes any person who intermeddles with the estate of the deceased and where a party sues or is sued in a representative character the person on whom the estate devolves on the death of the party so suing or sued.

The question thus is whether it can be said that in respect of the B

schedule property regarding which a decree of declaration and consequential mandatory injunction is granted by the trial court, the petitioners qualify as legal representatives of the deceased 1st defendant? The above question can be answered only in the negative. The 1st defendant was not the owner of the B schedule property at all. In fact years prior to the execution of the suit the additional 10th defendant had come to have ownership and possession over the property. The learned Munsiff himself has found so and declined execution against that defendant under the impugned order itself. Since the property was neither owned nor possessed by the 1st defendant at the time of his demise, his legal heirs including the petitioner could not have represented or meddled with the estate in question. It is not at all difficult to accept the argument of the learned counsel for the petitioner that the petitioner is not the legal representative of the deceased 1st defendant in relation to the decree schedule property. Legal heirs are persons entitled to inherit the surviving estate of the deceased. In this case the deceased 1st defendant had no right at all over the estate sued at the time of his demise. In other words, the deceased 1st defendant had not left behind him the estate sued so that his legal heirs could represent the

same after his demise [see the judgment of this court in **Mercy v. Aisha Ummal** (1987 (2) KLT 166)]. In this case the suit property was not part of the estate of the deceased and therefore there is no question of any of the additional defendants representing the suit property as legal heirs of the deceased. Pithily put, the question is whether the suit property was the property of the deceased at the time of his demise and whether the same has devolved upon the legal heirs upon his demise. The answer has to be in the negative (see the decision of the Supreme Court in **Leela Bai v. Rajaram** [(1998) 8 S.C.C. 543].

9. There is yet another reason as to why the petitioner cannot be compelled to obey the decree. On the court's own finding the decree schedule property belongs to and is in possession of the 10th defendant found to be a total stranger. Obeying the decree is possible only by trespassing into the 10th defendant's property which will be illegal. The execution court cannot compel the petitioner to perpetrate an illegality under the guise of enforcing obedience to a decree which is not passed against him by the trial court though he too was on the array.

10. The result of the foregoing discussion is that the petitioner

is not a legal representative of the first defendant in relation to B schedule property. The property at all relevant times belonged to the 10th defendant. Accordingly, the Writ Petition has to be allowed. Setting aside the impugned order, I hold that the decree is not executable as against the petitioner and dismiss the E.P. against him.

The Writ Petition is allowed as above. No costs.

srd **PIUS C.KURIAKOSE, JUDGE**